No. 15627

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TORRANCE NATIONAL BANK, a national banking association,

Appellant,

vs.

THE AETNA CASUALTY & SURETY COMPANY, a corporation,

Appellee.

APPELLANT'S REPLY BRIEF.

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Appellee urges only two arguments in answer to this appeal.

One of these is that Alden could not commit a forgery because Enesco had authorized him to sign its checks. The other is that appellant knew the purpose for which the money was being obtained and, therefore, it was not defrauded by Alden. We will deal briefly with each of these arguments.

Alden Was Not Authorized to Sign Any Checks to Obtain Money for His Personal Use.

The findings support this statement, as follows:

> "that said Joseph Alden used said currency to cash payroll checks for employees of National Supply

> Company whose employees had formed the said Enesco Federal Credit Union; that the Enesco Federal Credit Union had not authorized the use of any of its funds to carry on the check-cashing operation hereinafter described." [R. 32.]

The testimony of both William A. Hood, Enesco's President, and Gale W. Whitacre, its former President, clearly shows this to be the case. [R. 91-93, 95-98.]

The state court awarded judgment in favor of Enesco and against appellant on the ground that Enesco had no knowledge of Alden's peculations.

See:

> *Torrance National Bank v. Enesco Federal Credit Union,* 134 Cal. App. 2d 360.

We are not concerned with whether Alden had authority to sign Enesco checks in connection with the business and activities of Enesco. There is no question but what he did have such authority, but it does not follow that he had authority to sign checks for his own personal gain.

Appellee seems to have no difficulty whatever in assuming that because he could sign checks for Enesco, he could also sign Enesco checks for himself. According to appellee's argument, an agent could not possibly commit a forgery. Appellee's concept of authority is that an authorization to sign checks in connection with the principal's business is also an authorization to sign the principal's checks for the agent's use.

Any such rule which would exempt an agent from forgery, even though the check which he signed was outside the scope of authority, would be unrealistic to say the

least. Suppose that the agent was authorized to sign a particular specified check for the principal, and that he, nevertheless, signed other checks for his own benefit? Under such a rule it would not be a forgery to do this. Obviously, the statute (P. C., Sec. 470) does not contemplate any such unrealistic distinctions. Neither does it grant immunity to an agent who oversteps his authority and signs checks for his own purposes.

Both the wording of the statute and the authorities in Appellant's Opening Brief put at rest any such contention. They clearly show that the signing of a purported principal's name under a claim of authority is a forgery wherever authority to sign the particular check does not exist, and the agent knows it to be non-existent. The matter does not turn upon any such technical and unrealistic distinctions as whether he signed as agent under the printed signature of the purported principal, or whether he signed the principal's name as though he were, in fact, the principal.

Appellant Neither Knew of, nor Consented to, the Forgery.

Appellee's second point is based upon the unfounded assertion that appellant knew that Alden was cashing the Enesco check to obtain money for use in Alden's check cashing business.

The trial court found that:

> "the plaintiff bank knew the purpose for which the currency so secured by said Joseph Alden was being used, but did not know that the said Joseph Alden lacked authority to so use the funds;" [R. 33.]

This finding contains the implication that appellee knew that the check cashing business was the personal busi-

ness of Alden and not that of Enesco, but the evidence does not support such an inference. Mr. Alden testified that he had discussed the check cashing with both Mr. Post, the President of appellant, and Mr. Dinninger, the cashier. Mr. Post was deceased prior to the trial and Mr. Dinninger was paralyzed with a stroke [R. 101], so the only employee who testified was Mrs. Sandstrom, the teller who regularly handled these payments to Alden. Her testimony on the matter was as follows:

> "Q. Did you know whether or not check-cashing activities were carried on over at the Enesco Federal Credit Union office? . . .
>
> The Witness: Well, I presumed he was using it for cashing checks. I don't know what he had it for.
>
> Q. (By Mr. McLaughlin): I mean, did you know whose business that was? A. I didn't.
>
> Q. Did Mr. Alden ever state to you or in your presence anything about that being his own personal business, as distinguished from the Enesco Federal Credit Union's business? A. No, sir.
>
> Q. Was Mr. Alden ever made a bonded messenger by the Torrance National Bank? A. No, sir.
>
> Q. Was he ever employed by the Torrance National Bank in any capacity? A. No, sir." [R. 102-103.]

Originally this check cashing activity had been an operation of Enesco which it permitted Alden to carry on in its premises and permitted him to retain the fees as part of his compensation. This activity was specifically authorized by the Directors of Enesco on September 30, 1948. [Pltf. Ex. 5 and R. 87.]

On August 17, 1950, the Directors of Enesco qualified this activity by permitting Alden to continue it, provided that he assumed all liability and expense in connection with it. [Pltf. Ex. 6, and R. 88-89.]

In March of 1953 the Directors of Enesco held another meeting at which the check cashing service was again dealt with. Mr. Hood describes this as follows:

> "A. That evening we decided we would put an end to this check-cashing service. We were assured that night at the board meeting by Mr. Alden himself that the credit union was connected in no way, shape or form with it, and the money he obtained, he claimed he was a bank messenger and was working—
>
> Q. Did he say he was a bonded messenger for the bank? A. Bonded messenger.
>
> The Court: I think we should have this in the witness' words.
>
> Q. (By Mr. McLaughlin): Tell us in substance the questions and the statements that you people made, and the questions and statements he made, Mr. Hood. A. Well, it was that the service that he was rendering was doing more harm to our credit union than what he was doing good, and so the board of directors felt at that time they should stop it.
>
> He had been—had supplies bought ahead of time on some of his envelopes and letterheads, and so on and so forth, for his business that he had in there, and he asked if he could go for a period of time yet, until he used up those supplies which he had an inventory on.
>
> At that time he was asked again about the funds, and he assured us that he was a bonded messenger from the bank.

Q. I would like to have you say who asked him, and more, in what words, how that came up as to what the funds he was using were, if you can. A. As I recall, I think it was Mr. Whitacre that asked him, the president at that time of the credit union.

Q. Can you tell us in substance how it was asked or what Mr. Whitacre said to him? A. All I can say is I know he was asked, I mean in a way that we were trying to put a stop to it. We didn't want it to go on any more.

And he assured us at that time that he had no—the credit union had no chance of trouble or anything from what he was doing because he was clear, that was his end of it and he was totally responsible for the check-cashing service that he was rendering.

Q. At that time, Mr. Hood, had it ever been brought to your attention that money was being obtained from the Torrance National Bank by checks signed by Mr. Alden, on which he would withdraw money and use it in his check-cashing activities? A. No.

Q. Did you know that was going on? A. No." [R. 91-92.]

Mr. Alden never wrote up the minutes of the above described meeting. [R. 89.]

Mr. Whitacre further describes the events of that meeting as follows:

"A. Mr. Alden was very upset. He practically begged us to let him continue his money order service, until his current supply which he had purchased—in other words, he had quite a bit of money involved in money orders was up; he asked us to let him continue. He assured the board of directors that the credit union funds in no way, shape or

form were involved in this check-cashing or other enterprises. He also assured us he was a bonded messenger from the Torrance National Bank and that he was currently negotiating, even then, for an armored car to make these money deliveries to the credit union office.

Q. Did you know at that time he had been using Enesco Federal Credit Union checks to get the money— A. No, I did not.

Q. Did you know he had a supply of unnumbered checks which he had printed up and was using for that purpose? A. Not at that time, sir.

Q. When did you learn that? A. Approximately sometime around April the 4th or 5th.

Q. Of 1953? A. Of 1953; after the robbery.

Q. That was after the robbery. A. After the robbery." [R. 98.]

Although Alden's testimony as to whether appellant knew that the check cashing operation was his personal business is somewhat vacillating, he finally admitted that whatever appellant's officers knew about the matter was acquired in 1948 when Alden was actually carrying on the check cashing operation as a function of Enesco. His testimony in this connection is as follows:

"Q. (By Mr. McLaughlin): If you can, will you please tell us the time that you told either Mr. Post or Mr. Dinninger that you were getting these $30,000.00 sums for use in your personal business of check-cashing? A. Well, that would be a hard question to answer because they knew that I was cashing checks on my own personal—as my own personal business from the time I inaugurated, which was in the fall or the winter of 1948 or the spring of 1949.

They knew my check-cashing activity was being conducted as my personal business at that time.

Q. And they knew at that time— A. That was only two or three thousand dollars at that time.

Q. They knew at that time that it was with the consent of the Enesco Federal Credit Union that you were carrying on that activity, didn't they? A. That is true.

Q. What I want to know is, when you told them after this discussion with Mr. Schultz, telling you that had to be disassociated, when did you tell Post or Dinninger that you no longer were carrying that on with the consent of the Enesco Credit Union? A. I never told them, because that situation never existed. It was Mr. Schultz that disapproved, not the board of directors of the Enesco Federal Credit Union.

Q. Did you ever come to either Mr. Post or Mr. Dinninger after you heard from Mr. Schulty and state, 'Now, I am carrying this on as my own independent activity and I am not getting any sponsorship or funds from the Enesco Federal Credit Union?' In substance, did you ever say anything like that to either of them? A. No, because that situation never existed.

Q. I just want to know whether you did or not. A. I didn't." [R. 75.]

"Q. That doesn't tell us anything. I am asking you to give the substance of the words you used in telling Mr. Post or Mr. Dinninger that this money was being used by you in your personal check-cashing activities, as distinguished from an activity of the Enesco Federal Credit Union? A. In the particular time you specify, I can't say I said it was my personal activity, because they knew it was my personal activity, in the beginning.

Mr. Shallenberger: I move to strike the part 'because they knew' as a conclusion and not responsive.

The Court: Granted." [R. 80.]

It is clear from the above testimony that after Alden had been told by Enesco's Directors to discontinue the use of its funds in the check cashing operation, that he never advised appellant of this. Instead, he only made such changes as were necessary to conceal from Enesco the fact that he was continuing to use its money in his check cashing business. To this end he opened up an account under the name of Enesco Service Fund on a form of signature card indicating that Enesco Service Fund was an auxiliary account for Enesco Credit Union. The same form of "association" signature card was used by him in each instance. [Pltf. Exs. 1, 2 and 3; and R. 44-46.] Alden also started using the unnumbered checks so that Enesco's records would not disclose the checks which he used to obtain the moneys, and then he would pick up such check on the following day when he substituted the payroll checks, which he had cashed for the employees of National Supply Company, with the money withdrawn from appellant on the forged check.

In the light of this abundant evidence of wrongful intent of Alden, it is idle to state that he lacked a fraudulent intent. Of course, Section 470 of the Penal Code does not expressly require that there be a fraudulent intent. It does specify that the signing be without authority and that the signer know that he has no such authority. This knowledge is not only conclusively shown by the conduct of Alden in covering up his fraud, but also by the testimony of Hood and Whitacre as to Alden's concealments and misrepresentations to them.

In Appellant's Opening Brief we cited the authorities holding that even though one or more officers of appellant had been colluding with Alden in these forgeries, this would not exonerate appellee on its bond. In fact, we pointed out that if such collusion had actually existed, appellee would have been liable to appellant under another provision of its bonds for the entire $30,000.00 loss which appellant suffered.

We do not believe that any intimations of bad faith or collusion on the part of either Mr. Post or Mr. Dinninger are at all warranted by the record. They could not be present at the trial to defend against any such unfounded assertions, and if appellee now wishes to claim any such collusion on their part with Alden, then it should come forth and pay the whole $30,000.00 under its bond.

Conclusion.

It is submitted that appellee has failed to show any lawful basis for escaping the liability which it assumed under the terms of its bond. When a financial institution buys this kind of protection from a surety company, the surety should not be permitted to escape liability on any such meaningless technicalities as have been urged in this case. The judgment should be reversed with directions to enter judgment for appellant.

Respectfully submitted,

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Attorney for Appellant.